

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BUR-SUL, LTD.	:	:DETERMINATION
	:	DTA NO. 808460
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1978	:	
through November 30, 1978.	:	

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Petitioner, Bur-Sul, Ltd., Attn: Edward D. Burke, President, Noyac Road, P.O. Box 400, Sag Harbor, New York 11963, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through November 30, 1978.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 8, 1991 at 2:45 P.M., with additional evidence to be submitted by February 8, 1991. Petitioner appeared by Edward D. Burke, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

Bur-Sul, Ltd. ("petitioner") did not timely file its sales and use tax return for the period September 1, 1978 through November 30, 1978. The due date for the filing of the return was December 20, 1978; the return was filed on March 1, 1979 without payment of the tax due as set forth on the return.

According to the Division of Taxation's computerized accounts receivable system, a Notice and Demand for Payment of Sales and Use Taxes Due for the tax due (\$1,384.04), plus

penalty and interest, was issued to petitioner on January 29, 1980. Due to the fact that nearly 11 years had elapsed from the date of issuance of the notice and demand until the date of this hearing and, furthermore, since the issuance of a notice and demand did not require mailing by certified or registered mail, the Division of Taxation did not offer, at the hearing held herein, a copy of the notice and demand or proof of the date of its issuance to petitioner.

By a check dated July 24, 1980 drawn on the account of Bur-Sul, Ltd. d/b/a The Salty Dog (the check contained deposit serial no. 0188780 and was deposited on August 7, 1980), petitioner paid the sum of \$1,636.66 to the New York State Sales Tax Bureau. Apparently, petitioner assumed that the payment was to satisfy its outstanding sales tax liability for the period at issue herein.

In March 1988, petitioner received notification from the Division of Taxation, dated March 1, 1988, that its sales tax liability for the quarter ended November 30, 1978 remained unpaid and that the amount of \$4,001.51 was then due.<sup>1</sup>

In its petition, petitioner states that "notice was not received until March 10, 1988". By letter dated March 14, 1988 from petitioner's president and representative, Edward D. Burke, to the tax compliance representative, additional time (at least four weeks) was requested to retrieve records which petitioner contended would prove that payment had been made.

By a notice from the Suffolk District Office dated August 30, 1988, petitioner was advised that the total due was now \$4,296.51. Mr. Burke sent a letter to the district office dated September 8, 1988 in which he enclosed a copy of the check (see, Finding of Fact "3") which he contended was for payment for the period at issue.

Petitioner was then advised, by a memorandum dated February 2, 1990, that unless

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<sup>1</sup>The Division's answer alleges that a notice and demand was issued to petitioner on January 29, 1988. As indicated in Finding of Fact "2", supra, a notice and demand was issued on January 29, 1980. It seems quite likely, therefore, that this allegation by the Division was in error. The March 1988 notification referred to herein was from a tax compliance representative in the Suffolk District Office. A copy of this notification was attached to the petition.

payment of \$4,990.84 was made by February 13, 1990, warrant proceedings would be instituted. On February 27, 1990, Mr. Burke sent a letter to the Tax Compliance Section of the Suffolk District Office which, among other things, requested a "hearing" before the Bureau of Conciliation and Mediation Services.<sup>2</sup> Subsequent letters requesting a conciliation conference were sent to the Suffolk District Office and the Bureau of Conciliation and Mediation Services on March 29, 1990 and April 23, 1990, respectively.

On June 8, 1990, a Conciliation Order was issued which provided as follows:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was

issued on January 29, 1988, but the request was not mailed until April 23, 1990, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

#### CONCLUSIONS OF LAW

A. 20 NYCRR 4000.3(c) provides that a request for a conciliation conference must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for a hearing in the Division of Tax Appeals and that there can be no extension of those time limitations.

Tax Law § 2006(4) provides that the Tax Appeals Tribunal shall have, among others, the following functions, powers and duties:

"To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter. Where such a request is made by a person seeking review of taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing to review such liability."

B. A Notice and Demand for Payment of Sales and Use Taxes Due is issued when a taxpayer has, after audit, agreed to the amount of tax due, when a return is filed but the amount

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<sup>2</sup>Sometime during February 1990, Mr. Burke, in a letter to the tax compliance agent, requested "a hearing to properly resolve this matter". The undated letter included, as an enclosure, a copy of the notice dated February 2, 1990.

of tax shown to be due is not paid with the filing of the return, when a return showing an amount of tax due is filed late or when a return contains one or more mathematical errors (20 NYCRR 535.6).

In the present matter, the Division of Taxation made no determination of tax due. Petitioner, by the filing of a return, made the determination itself, i.e., the tax at issue herein was self-assessed. Since this is simply an instance where petitioner filed a return but did not pay the amount of tax shown to be due thereon, the Division properly issued a notice and demand to collect what petitioner agreed was due and owing.

C. Unlike a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, which must be mailed by registered or certified mail (Tax Law § 1147[a][1]), there are no such mailing requirements for the issuance of a notice and demand.

There is certainly some confusion regarding the actual date of issuance of the notice and demand to petitioner. According to the Division's accounts receivable system, it was issued on January 29, 1980. According to the Division's answer and the Conciliation Order, it was issued on January 29, 1988. If petitioner is to be believed, the first notice it received was the letter from the Suffolk District Office Tax Compliance Section dated March 1, 1988 which it contends was not received until March 10, 1988.

While there is no statutory provision for an administrative hearing to contest a notice and demand in circumstances such as those found in the present matter, even assuming, arguendo, that petitioner is entitled to such a hearing, a petition must, nonetheless, be filed within 90 days from the date of issuance of the notice by the Division of Taxation which gave rise to a determination or claim that taxes were due (20 NYCRR 4000.3[c]; Tax Law § 2006[4]). If the notice and demand was, in fact, issued on January 29, 1980, there is no evidence that a petition was filed within 90 days therefrom. Even if petitioner is correct that no notice was received until March 10, 1988, this record is devoid of the existence of a request for a conciliation conference filed within 90 days of March 10, 1988. The only correspondence from petitioner within this 90-day period is a letter from petitioner's president/representative to the tax

compliance representative in the Suffolk District Office which seeks at least four additional weeks to retrieve records. While the letter contends that payment of the liability had previously been made, this letter cannot, with even the most liberal construction, be construed as a protest and/or request for a conciliation conference or administrative hearing. Only after much other correspondence passed between the parties did petitioner actually request a conference (or hearing), and the earliest mention, in any of petitioner's letters, of such request is in an undated letter which, because of the enclosure of a notice dated February 2, 1990, had to have been written after such date. Accordingly, the Conciliation Order denying petitioner's request for a conciliation conference on the basis that a request therefor was not filed within the 90-day period must be sustained.

D. The petition of Bur-Sul, Ltd. is dismissed.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE